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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-96

No. ~~1454~~

PHILIP J. PICARD,
PETITIONER,
v.

JAMES J. CONNOR,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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Opinions Below

The opinion of the court below (App. A) is reported at 434 F.2d 673. The opinion of the district court (App. C) is reported at 308 F. Supp. 843.

Jurisdiction

The judgment of the court below was entered on December 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statute Involved

MASSACHUSETTS GENERAL LAWS, c. 277,

§ *19. Name of accused person: description by fictitious name; entry of true name.* If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.

Questions Presented

1. Whether the Court of Appeals erred in finding that the respondent had exhausted his state remedies as required by 28 U.S.C. 2254?
2. Whether application of Massachusetts General Laws, ch. 277, §19 in the circumstances of this case resulted in a denial of equal protection in violation of the Fourteenth Amendment to the United States Constitution?
3. Whether the Court of Appeals erred in finding a state statute unconstitutional as applied to the respondent where application of said statute did not raise any federal constitutional questions?

Prior Proceedings

Respondent, James J. Connor, was convicted in the Superior Court of Suffolk County of murder in the first degree. He was sentenced to life imprisonment. The conviction was affirmed by the Massachusetts Supreme Judicial Court on August 22, 1967. *Commonwealth* v. *Doherty,* 353

Mass. 197. On or about December 18, 1968, respondent, Connor, filed a petition for a writ of habeas corpus in the United States District Court, District of Massachusetts. On January 16, 1970, that court dismissed the petition after a hearing. On May 28, 1970, respondent, Connor, filed an appeal from the decision of the United States District Court in the United States Court of Appeals. On December 10, 1970, the Court of Appeals vacated the judgment of the district court and remanded the case with instructions to grant the writ "unless within a reasonable time set by the district court [Connor] is indicted by the Commonwealth." The decision was based on a finding that Mass. General Laws ch. 277, §19, permitting the amendment of a 'John Doe' indictment to show the true name of the defendant, violated the Equal Protection Clause of the Fourteenth Amendment.

The Commonwealth of Massachusetts now petitions to the Supreme Court of the United States for a writ of certiorari to review that decision.

Argument

I. THE COURT OF APPEALS ERRED IN FINDING THAT THE RESPONDENT HAD EXHAUSTED HIS STATE REMEDIES AND IT SHOULD HAVE ABSTAINED FROM DECIDING THE CASE ON AN ISSUE NEVER RAISED IN THE STATE COURTS.

The argument that the application of Mass. General Laws ch. 277, §19 to the respondent violated his constitutional right to equal protection was not presented to the Supreme Judicial Court of Massachusetts. Nor, did respondent make this claim in his petition for a writ of habeas corpus before the United States District Court. Rather, this argument was *first advanced* by the United

States Court of Appeals. It was never urged by respondent, Connor.

It is settled that exhaustion of state remedies is a prerequisite to federal habeas corpus jurisdiction.

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such person ineffective to protect the rights of the prisoner." 28 U.S.C., Sec. 2254 (b).

The exhaustion doctrine is designed to allow state courts the first opportunity to correct any errors which may have occurred in the state criminal process before the federal courts intervene. It is a rule of comity and not of jurisdiction.

In the instant case, although the respondent alleged in the state court that the indictment charging him with murder was invalid in that there was no description indicating that he was the 'John Doe' named in the indictment, he *never* advanced the theory that the Massachusetts procedure governing 'John Doe' indictments violated the Equal Protection Clause of the Fourteenth Amendment.

It is equally well settled that the exhaustion doctrine encompasses not only exhaustion of the procedural steps available, but also the raising in state courts of the point upon which jurisdiction of the federal court may be predicated. *United States ex rel. Pollock* v. *Denno,* 183 F. Supp. 514 (D.C.S.D., N.Y., 1960); *United States ex rel. Kessler* v. *Fay,* 232 F. Supp. 139 (D.C.S.D., N.Y., 1964). The Court of Appeals decided this case on an equal pro-

tection basis, a point never raised in either the state courts or the United States District Court. Indeed, the Court of Appeals itself first advanced the thory of the Equal Protection clause violation.

The claim that respondent's conviction violated the Equal Protection Clause of the Fourteenth Amendment should be presented to the state courts first. See *James* v. *Copinger*, 428 F.2d 225, (4th Cir., 1970). This Court stated in *Darr* v. *Buford*:

> "As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solutions was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. 339 U.S. 202, 204 (1950)."

The rationale underlying the doctrine of exhaustion is quite similar to the rationale upon which the doctrine of abstention in proceedings brought under 28 U.S.C. §§2281, 2284 is based. The same valued principles of federalism and comity apply.

The decision in the instant case is that Massachusetts General Laws, ch. 277, §19 is unconstitutional as applied to the respondent. Although there is nothing in the decision of the Court of Appeals to prevent Massachusetts from indicting other persons in accord with the statute in question, future 'John Doe' indictments must now be clouded by the threat of federal court intervention at each

instance in which this state criminal procedure is exercised.

This decision will affect other states as well. Ten other states have statutes similar or identical to the Massachusetts statute in question.[1] The cloud that has been placed on the criminal procedure of all these states will surely give rise to numerous litigation and conflicting judicial decisions. Indeed, the instant decision has already created a conflict in the federal circuits. In 1949, the Court of Appeals for the Second Circuit, held that the state of New York's use of a 'John Doe' indictment did not constitute a denial of equal protection of the laws

> "because affirmance of [Morrison's] conviction shows that under like circumstances defendants in other cases would be subject to the same legal rules as were applied in his case." *United States ex rel. Morrison* v. *Foster*, 175 F.2d 495, 498.

In the *Foster* case, the New York courts had the opportunity to interpret their 'John Doe' statute vis-a-vis the equal protection argument. Ibid., at 497. The Massachusetts courts have not been granted that opportunity in the instant case.

The Court of Appeals should have abstained from construing the Massachusetts statute in these circumstances since an interpretation of the statute by the Massachusetts Supreme Judicial Court vis-a-vis the equal protection argument could well have been dispositive of the case. *Rail-*

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[1] Calif., Penal Code Sec. 953; New York, Code of Criminal Procedure Sec. 277; Nev., Rev. Stat., Ch. 174, Sec. 105; La., Code of Criminal Procedure, T.T. 13, Ch. 2, Art. 466; Rhode Island Criminal Procedure, 12-12-2; Okla. Stat. Anno. 22 Sec. 409.3; Iowa, Code Anno. Sec. 773.8; So. Dakota, Compiled Laws, 1967 Anno., Crim. Procedure, 23-32-12, 13; Ariz. Rev. Stat. Rule 117; Idaho, Code 19-1412.

road Commission of Texas v. *Pullman Co.*, 312 U.S. 496 (1940); *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168 (1941); *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Cameron* v. *Johnson*, 390 U.S. 611 (1968); *Reetz* v. *Bozanick*, 397 U.S. 82 (1970). See also *Cardinale* v. *Louisiana*, 349 U.S. 437, 459 (1969), where this Court stated:

> "... in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality."

In the instant case, there is no allegation of 'facial' invalidity of Mass. General Laws, ch. 277, §19. Indeed, if there were, the Declaratory Judgment Act (Mass. General Laws ch. 231A) would provide the appropriate avenue for adjudication of the issue. Moreover, no First Amendment guarantee is involved. Similarly, unlike the situation in *Zwickler* v. *Koota*, 389 U.S. 241, (1967), the state statute under consideration here is not patently unconstitutional, nor incapable of narrow construction or limitation by the state courts.

The Court of Appeals decision clearly violates the principles underlying the abstention doctrine which were most recently reaffirmed in *Younger* v. *Harris*, —— U.S. ——, 8 Cr. L. 3103, 3105:

> "What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, *always endeavors to do so in ways that will*

not unduly intervene with the legitimate activities of the States." (Emphasis supplied)

In the instant case the courts of Massachusetts should have been granted, at the minimum, the opportunity to construe Mass. General Laws ch. 277, §19 in light of the Equal Protection Clause of the Fourteenth Amendment. Exhaustion is based on much of the same policy as abstention.

If the accepted practice is for a federal court to refrain from granting equitable relief from state criminal proceedings on the basis of the doctrine of abstention or comity necessary for a successful and harmonious functioning of the federal system, (with the exception of First Amendment cases), we suggest, there is no less a basis for a like exercise of restraint in habeas corpus proceedings in which jurisdiction to render judgment on the constitutionality of a state statute is at least questionable and should not be exercised until state remedies are exhausted.

By granting the writ of habeas corpus in the circumstances of this case the Court of Appeals has struck at

> "... perhaps the most sensitive source of friction between states and nation, namely the active intrusion of the federal courts in the administration of criminal law for the prosecution of crimes solely within the power of the states." *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951).

II. Application of Mass. Gen. Laws c. 277, Sec. 19 to the Circumstances of this Case Did Not Involve a Denial of Equal Protection in Violation of the United States Constitution.

Article XII of the Massachusetts Declaration of Rights provides in pertinent part:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; * * *

That Article has been construed by the Massachusetts Supreme Judicial Court to mean that a sentence to a state prison, or capital punishment, may not be imposed unless the criminal proceedings were originated by an indictment or presentment of a grand jury. *Jones* v. *Robbins*, 74 Mass. (8 Gray) 329, 342-349 (1857).

Mass. Gen. Laws ch. 277, Sec. 19, which was made applicable to respondent in the state trial court, provides:

> If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of a defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsquent proceedings, with a reference to the fact that he was indicted by name or description mentioned in the indictment.

In *Commonwealth* v. *Gedzium*, 259 Mass. 453, 156 N.E.2d 890 (1927), the Massachusetts Supreme Judicial Court concluded that the provisions of this statute were fully consistent with the provisions of Article XII of the Declaration of Rights. In reaching that conclusion, the court noted in particular reference to that case (259 Mass. at 460-461):

> There is nothing in this record to warrant the inference that the grand jury, in framing the indictment, did not use all the information within its reach in de-

scribing the defendant, and did not have in mind a particular person, of whom no better description could be given than a fictitious name. The indictment cannot rightly be construed in the circumstances here disclosed as an indictment in blank, usable at will against any member of the community. Someone must be described in an indictment as charged with the commission of a crime. Commonly the name of a person is the distinctive characterization in words by which he is known and distinguished from others. (Citation omitted). Nevertheless, the grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge, to disguise his lineaments and peculiarities and to hide his personal appearance and identifying characteristics so that no adequate description of him can be given when his definite existence as a human being is disclosed and established. A fictitious description of an actual person, when that is the best description obtainable, authorized by legislative enactment, does not violate the provisions of said art. 12.

Motion to enter upon the record the true name of the person indicted, to be used in subsequent proceedings, must be allowed by the court as it was in the case at bar. Such allowance *presupposes the finding by the court* of all the facts essential thereto to the end that no injustice be done to any defendant. (Citations omitted, emphasis supplied).

In the circumstances, application of the provisions of Mass. Gen. Laws ch. 277, Sec. 19 to respondent involved no violation of the equal protection clause of the Fourteenth Amendment. In construing that statute as consistent with the provisions of Article XII, the Massachusetts Supreme

Judicial Court concluded that the legislature directed its concern to a particular classification, to wit, a classification where the grand jury, although able to conclude that there was probable cause to believe that all of the elements of the crime were present, was unable to determine the perpetrator's name or a description which would readily admit to any degree of particularization. The court further noted that this classification was just and reasonable, lest an undue preference be accorded to the cunning, the discreet, or the disguised, whose actual description could not be reasonably particularized to any degree of certainty. Under the court's interpretation of the statutory provisions, *prompt* justice would befall the notorious and disguised alike.

This classification — when measured against this declared purpose — does no violence to the equal protection clause. The classification, of course, does not concern itself with race, color, national origin, age, sex, political leanings, financial status, or any other readily identifiable group. Thus, the cases concerning those identifiable groups are not controlling with respect to the issue under consideration here. In these circumstances, the equal protection contention must be tested by the following set of "rules," to wit (*Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)):

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

On this record, it is clear that respondent had fallen far short of sustaining his burden of showing that the statutory classification "is essentially arbitrary." Moreover, it is clear—notwithstanding the allocation of the burden of proof — that the statutory classification is in fact reasonable. As noted by the Massachusetts Supreme Judicial Court, the statute permits the grand jury to perform its solemn office in spite of the fact that the perpetrator of the crime has chosen to act in a discreet manner so as to disguise his identity and appearance. And the statute also assures that the discreet and disguised, as well as the notorious, will be brought to the book *promptly* — a very real societal interest. *Commonwealth* v. *Gedzuim*, 259 Mass. 453, 460-461.

In short, the statute does serve a legitimate societal and state interest, and is fully consistent with the equal protection clause of the Fourteenth Amendment.

III. The United States Court of Appeals Erred in Construing a State Statute Which Did Not Involve Any Federal Constitutional Elements.

The decision of the Court of Appeals involved the interpretation of a rule of state law which did not constitute a "violation of the Constitution or laws or treaties of the United States" 28 U.S.C. Sec. 2241(c) (3).

The right to indictment guaranteed by the Fifth Amend-

ment of the United States Constitution is not applicable to the states. *Hurtado* v. *California,* 110 U.S. 516 (1883); *Morford* v. *Hocker,* 394 F.2d 169 (9th Cir., 1968).

The grand jury returned an indictment against one Donald E. Landry "and John Doe, the true name and a more particular description of the said John Doe being to said jurors unknown." On August 6, 1965, respondent was arrested while in the company of the aforementioned Landry. On August 9, 1965, the prosecutor filed a motion — under the provisions of Mass. Gen. Laws, ch. 277, Sec. 19 — to amend the indictment by substituting the name of respondent in the place of "John Doe". The motion was granted over respondent's objection. There has been no question raised as to the sufficiency of the indictment with respect to the identity of other principals and accessories named therein.

Respondent was obviously indicted in accord with Massachusetts procedures. It has been consistently held that the substitution of a name is a matter of form, and not of substance, provided that the grand jury has found probable cause to conclude that the accused has committed the designated crime. *Dye* v. *Socks,* 279 F.2d 834 (6th Cir., 1960); *United States* v. *Fawcett,* 115 F.2d 764 (3rd Cir., 1940); *United States* v. *Campbell,* 235 F. Supp. 94 (E.D. Tenn., 1964). Massachusetts Law is in accord. See: *Commonwealth* v. *Binkiewicz,* 342 Mass. 740, 747-748, 749; *Commonwealth* v. *Di Stasio,* 249 Mass. 273.

Assuming that the Constitution requires, at a bare minimum, that there be probable cause to believe that the accused has committed the crime prior to bringing him to trial, there remain two further relevant considerations: (1), must the record affirmatively reflect facts which establish the existence of probable cause; and (2), to whom must the showing of probable cause be made. We discuss each consideration separately below.

1. It seems clear that evidence establishing the existence of probable cause need not, as a constitutional requisite, be affirmatively spread upon the record prior to trial. Under the usual practice, an indictment is returned with nothing more. An accused is not permitted to discover or inspect the grand jury minutes before, during, or after, trial merely to determine whether or not there was sufficient evidence to establish the existence of probable cause. *United States* v. *Eskow,* 179 F. Supp. 556 (S.D.N.Y., 1968); *United States* v. *Silverman,* 132 F. Supp. 820 (D. Conn., 1955).

2. The more troubling question concerns to whom the showing of probable cause must be made. There is no dispute that a showing of probable cause to a legally constituted grand jury is all that is constitutionally required. In our view, a grand jury is not a *constitutional* necessity. In *Hurtado* v. *California,* 110 U.S. 516 (1884), the Supreme Court of the United States held that an indictment returned by a grand jury was not a constitutional prerequisite to bringing an accused to trial for murder. Of course, in that case, the information procedure then in use in California required that a magistrate be satisfied by written depositions that there was probable cause to believe that the accused in fact committed the crime. See *Hurtado,* at 516-518, 538. That distinction, however, proved to be without constitutional relevance or significance. In *Lem Woon* v. *State of Oregon,* 229 U.S. 586 (1913), the defendant Lem Woon was tried for murder upon an information filed by the district attorney. At that time, the (*Lem Woon,* at 587):

> * * * Constitution and laws of Oregon * * * in force did not require any examination, or commitment by a magistrate, as a condition precedent to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath. (Citations omitted).

Lem Woon argued that his conviction was unconstitutional because he was not proceeded against by indictment. He attempted to avoid the rationale of the *Hurtado* case by arguing that, in *Hurtado,* the petitioner was entitled to a preliminary judicial examination into the issue of probable cause before he could legally be brought to trial, whereas he, Lem Woon, was not so entitled under the laws of Oregon. The Court summarily rejected this purported distinction, stating (*Lem Woon,* at 590):

> The distinction sought to be drawn between the present case and of Hurtado, on the ground that the Oregon system did not require that the information be preceded by the arrest or preliminary examination of the accused, is untenable.
>
> Although [Lem Woon] waived examination, we prefer not to rest upon the circumstance as a ground of decision. For if (as seems to be conceded) the preliminary examination had no lawful status under the laws of Oregon, it is not easy to see how his position was altered for the worse by his waiving such examination.
>
> But since, as this court has so often held, the "due process of law" clause does not require the state to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory upon the states.
>
> The matter is so clearly settled by our previous decisions that further discussion is unnecessary.

The rationale of *Lem Woon* — i.e., that probable cause on the part of the *prosecutor* is sufficient to bring an accused to trial — was followed by the Court in *Ocampo* v. *United States,* 234 U.S. 91 (1919). To our knowledge, no court has

departed from that established principle. E.g., *Lyle* v. *Edison*, 182 F.2d 345, 346 (8th Cir., 1950); *Lewis* v. *State of Oklahoma*, 304 F. Supp. 116, 122 (W.D. Okla., 1969); *Cody* v. *Page*, 296 F. Supp. 961, 962 (W.D. Okla., 1969); *Williams* v. *Page*, 289 F. Supp. 661, 663 (E.D. Okla., 1968). It is thus clear that probable cause on the part of the *prosecutor* is sufficient to bring an accused to trial.

With reference to the above-stated principles, we submit that it is clear that respondent's conviction for murder in the first degree was fully consistent with the applicable guarantees of the United States Constitution. Moreover, the fact that the prosecutor moved that the indictment be altered to reflect respondent's true name evidences that the prosecutor had probable cause to believe that respondent committed the crime of which he was subsequently convicted. For the reasons stated above, the fact that the record does not affirmatively reflect the evidence upon which Chief Justice Tauro reached this conclusion is irrelevant. It may well be that such evidence was communicated to the Chief Justice without a stenographer present and ex parte by the investigators who also testified before the grand jury. If that was the case, then the respondent was not prejudiced, since grand jury proceedings are, by their very nature, carried on in an ex parte proceeding. At the very least the Court of Appeals should have sent the case back to the state courts for an authoritative interpretation of what Massachusetts law requires to amend a "John Doe" indictment, and if those requirements were met in this case.

Taken together, it is clear that one, if not all, of three offices — i.e., the grand jury, the prosecutor, and the Chief Justice — had probable cause to believe that respondent committed the crime of which he was subsequently convicted. The United States Constitution demands no more.

Moreover, the statute which the Court of Appeals has seen fit to interpret is one concerning state procedure and

does not involve a constitutional guarantee. The interpretation of such a statute should properly be left to the consideration and judgment of the courts of that state. *Brady* v. *State of Maryland*, 373 U.S. 83, 90 (1963); *United States ex rel Almieda* v. *Rundle*, 255 F. Supp. 936 (D.C.E.D. Pa., 1963); aff'd, 383 F.2d 421 (3rd Cir., 1967), cert. den., 393 U.S. 863 (1968).

Conclusion

The petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537

JAMES J. CONNOR,
PETITIONER, APPELLANT,
v.
PHILIP J. PICARD,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE AND COFFIN, *Circuit Judges*.

James J. Twohig for appellant.
Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *Garrett H. Byrne*, District Attorney, Suffolk County, were on brief, for appellee.

December 10, 1970

ALDRICH, *Chief Judge*. A Massachusetts grand jury indicted Donald Landry, three other named defendants, and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," in connection with the killing of one Robert Davis. Subsequently petitioner Connor was found in Landry's apartment and arrested. On motion presented to the Superior Court by the district attorney, the follow-in order was entered over petitioner's objection.[1] "Court

[1] We make note of the objection because we are not to be taken as intimating that a Massachusetts defendant cannot waive what we herein hold is his right to be properly indicted.

having determined that the true name of John Doe has been discovered to be James J. Connor, orders the name of James J. Connor to be entered on the record." This procedure was authorized by a Massachusetts statute, Mass. G.L. c. 277, § 19.[2] Petitioner was arraigned on the indictment. After unsuccessful attempts by him to inspect the grand jury minutes to ascertain whether there was evidence implicating him in the killing, the case went to trial and petitioner was convicted of first degree murder. His state appeal challenging, *inter alia,* the validity of the indictment, failed. *Commonwealth* v. *Doherty,* 1967, 353 Mass. 197 (two justices dissenting). He then brought a habeas corpus petition in the district court and, when he failed there as well, this appeal followed.

Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his statute remedy, citing *Needel* v. *Scafati,* 1 Cir., 1969, 412 F.2d 761, *cert. denied* 396 U.S. 861, and *Subilosky* v. *Commonwealth,* 1 Cir., 1969, 412 F.2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel,* nor precedent, as in *Subilosky,* that were not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with "an opportunity to apply controlling legal principles to the facts bearing upon [his]

[2] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by another practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment." Mass. G.L. c. 277, § 19.

constitutional claim." *United States ex rel. Kemp* v. *Pate,* 7 Cir., 1966, 359 F.2d 749, 751; *cf. Wilbur* v. *Maine,* 1 Cir., 1970, 421 F.2d 327. That is enough to satisfy the requirements of the exhaustion of the doctrine. *Sullivan* v. *Scafati,* 1 Cir., 1970, 428 F.2d 1023, 1024 n. 1. We therefore turn to the merits.

The Commonwealth's initial brief asserts that "... properly viewed, petitioner's sole argument is no more than one that there was insufficient evidence before the grand jury showing that petitioner was Landry's accomplice. Such a claim, however, does not warrant judicial review. [Citations omitted.] There are sound policy reasons underlying the rule that an accused cannot challenge the sufficiency of the evidence before the grand jury." This misstates the issue. Petitioner is not challenging the validity of the grand jury determination. On the contrary, the grand jury itself has said that there was insufficient evidence to indict him, and we accept that as true. *See Commonwealth* v. *Gedzium,* 1927, 259 Mass. 453, 458. The question is whether, since the jury concededly did not find probable cause, petitioner has a constitutional complaint. We assume there is no general due process right to require that prosecution be preceded by an indictment. *Lem Woon* v. *Oregon,* 1913, 229 U.S. 586; *Hurtado* v. *California,* 1884, 110 U.S. 516; *see Beck* v. *Washington,* 1962, 369 U.S. 541, 545; *cf. Ocampo* v. *United States,* 1914, 234 U.S. 91. The issue is whether, in view of the extent to which Massachusetts affords this protection to others, the procedure by which petitioner was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws.

The Massachusetts court has defined the requirements of the Commonwealth's Constitution.

> "The great principle asserted by the Declaration of Rights is that no man shall be put to answer a crim-

> inal charge until the incriminating evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends."

Commonwealth v. *Holley,* 1855, 3 Gray 458, 459 (Shaw, Ch. J.).

Because of this requirement, Massachusetts indictments are, with the possible exception of the John Doe procedure, amendable only with respect "to matters of form and not as to matters of substance." *Commonwealth* v. *Snow,* 1930, 269 Mass. 598, 606.[3] In sustaining the present statute in 1927, the Massachusetts court acknowledged that legislative authority to interfere with the protection of the grand jury system was limited to "minor details or unessential formalities." *Commonwealth* v. *Gedzium,* ante at 459. It justified the procedure by stating, without elucidation, that the addition of the defendant's name was neither an amendment nor completing an indictment "in black." Id. at 457, 461.

We are not concerned with the soundness of the conclusion that the John Doe procedure is not in conflict with the Massachusetts Declaration of Rights, but we are concerned with its consequences. There can be no doubt as to the substantiality of the loss to a defendant of the protection afforded by a requirement that there must be an indictment before he can be brought to trial. The grand jury is "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusa-

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[3] *Compare Commonwealth* v. *Cooper*, 1928, 264 Mass. 378 (arson; words "wilfully and maliciously" cannot be added) *and Commonwealth* v. *Snow*, ante (extortion; identity of person threatened cannot be changed), *with Commonwealth* v. *DiStasio*, 1936, 294 Mass. 273 (murder; true name of victim designated as "John Doe" can be attached where indictment alleged date and place of commission of crime). *See also Commonwealth* v. *Crotty*, 1865, 10 Allen 403.

tion whether it comes from government, or be prompted by partisan passion or private enmity." *Ex parte Bain*, 1887, 121 U.S. 1, 11. Nor can we doubt that petitioner was denied that protection. Entering a defendant's name on the record could be termed a matter of form only if the grand jury had already sufficiently described him so that adding the true name was, in fact, only a formal matter.[4] Absent such identification, the court's assertion in *Gedzium* that there was no reason to suppose that the grand jury "did not have in mind a particular person," 259 Mass. at 460, might, with due respect, be termed sophistical. Of course the jury had in mind a particular person, viz., the person who committed the crime. It had nothing in mind, however, to indicate the criminality, to use the court's word in *Holley*, of the petitioner. We must agree with the view of the dissenting justices in petitioner's case. *See* 353 Mass. at 216-18. Petitioner faced trial not as the result of a determination of his criminality by the grand jury, but because, relying on the special statutory procedure, the jury delegated this decision to others.[5]

We come, then, to the question: whether there is adequate justification for the difference in treatment Massachusetts accords defendants like petitioner and those who are brought to trial on regular indictments. If the difference

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[4] In *Commonwealth* v. *Crotty*, 1865, 10 Allen 403, the Massachusetts court suggested that if the document—there a warrant—although using a fictitious name, described the defendant's "occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified," it might be "sufficient to indicate clearly" who was intended. Id. at 405.

[5] We may observe that under the Massachusetts John Doe practice not only is it never established that any newly discovered evidence relied upon by the prosecuting attorney in naming a defendant would have been sufficient to persuade the grand jury, there appears to be no obligation on his part to produce any new evidence at all. So far as the statute provides, he is apparently at liberty merely to conclude that the grand jury was over-cautious in rejecting what he originally presented.

is to withstand constitutional scrutiny it must be based upon classifications which, at a minimum, are rationally related to a permissible state purpose. *See, e.g., Walters* v. *City of St. Louis,* 1954, 347 U.S. 231; *Skinner* v. *Oklahoma ex rel. Williamson,* 1942, 316 U.S. 535; *Lindsley* v. *Natural Carbonic Gas Co.,* 1911, 220 U.S. 61. The Commonwealth has suggested only one justification for its procedure. The court in *Gedzium* said, at 461:

> "[T]he grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge, to disguise his lineaments and peculiarities and to hide his personal appearance and his identifying characteristics so that no adequate description of him can be given when his definite existence as a human being is disclosed and established."

Having in mind that in *Gedzium,* as here, there was no indication that the actor had used any form of disguise, the court's rhetoric is merely a euphemism for the absence of evidence. A more frank, though obviously less palatable, statement of its position would be that while, where the actor is known to the grand jury, he cannot be charged unless it finds the evidence against him sufficient; if he is not known because, like criminals generally, he has neglected to reveal his identity, this relieves the Commonwealth of the necessity of obtaining any grand jury finding of cause.

As a basis for classification, the *Gedzium* rationale is not even minimally persuasive. Even if it should appear that the action made a deliberate attempt to "hamper" the grand jury, to say that conduct on his part justifies the denial of customary rights to whatever person the prosecuting attorney might thereafter choose as a defendant bridges the very question at issue. One might equally say

that a robbery defendant should not be allowed to assert inability to afford counsel in view of all the money he stole.

We see no end served by the statute except prosecutorial convenience. However, the Commonwealth properly does not argue that the mere fact that, for no definable reason — whether deliberate, fortuitous, or inadvertent — it sought an indictment before it had sufficient basis for one, should relieve it of the necessity of returning to the grand jury when it had a better case. As a ground for distinguishing between defendants, this is clearly inadequate. *See* Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065, 1081 (1969).

With all deference, the Massachusetts court has approved a procedure similar to the one it condemned in *Commonwealth* v. *Crotty,* n. 4 ante, as comparable to the detested pre-Revolutionary general warrant. It is no better merely because the delegation was made by a grand jury rather than by a magistrate. In the light of the Commonwealth's otherwise universal commitment to grand jury indictments in felony cases, we must conclude that the arbitrary decision to make such a delegation in petitioner's case was constitutionally impermissible discrimination.

The judgment of the district court dismissing the petition is vacated. The case is remanded with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7537.

JAMES J. CONNOR,
PETITIONER, APPELLANT,
v.
PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT, APPELLEE.

JUDGMENT
Entered: December 10, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court dismissing the petition for a writ of habeas corpus is vacated and the case is remanded to that court with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth. No costs.

By the Court:
(s) DANA H. GALLUP
Clerk

[cc: Messrs. Twohig and Quinn.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil
No. 68-88-G

JAMES J. CONNOR,
PETITIONER,
v.
PHILIP J. PICARD, Superintendent,
Massachusetts Correctional Institution, Norfolk,
RESPONDENT.

OPINION
January 16, 1970

GARRITY, J. Petitioner for haveas corpus, Connor, and a codefendant Lendry were found guilty on March 25, 1966 of murder in the first degree of Davis. The crime was committed on May 1, 1965. The jury recommended that the death penalty not be imposed and petitioner is serving a life sentence. Codefendants named Doherty were found guilty of being accessories. Petitioner's conviction was affirmed on appeal, *Commonwealth* v. *Doherty,* 353 Mass. 197, decided August 22, 1967.

The petition for habeas corpus asserts seven numbered grounds for relief, but without specifying in some instances the federal constitutional right relied upon and the exhaustion of avilable state remedies regarding the particular claim. Accordingly, the court entered an order limiting the hearing to reasons (1) and (3) unless the petitioner should file prehearing statements showing his exhaustion of state remedies with respect to certain grounds and the federal constitutional nature of others. No such statements were received from petitioner previous to the

hearing, but at the hearing on the petition for the writ, on motion of the petitioner, leave was granted to include such statements in a brief to be submitted after the hearing. The effect of the court's limiting order, as modified by allowance of the petitioner's motion at the hearing, has been to exclude from the court's consideration three of the seven grounds asserted in the petition, numbers (2), (4) and (5).[1] At the hearing in this court, the petitioner was represented by the same attorney who represented him at the trial and in the Supreme Judicial Court on appeal.

Findings of Fact

The evidence at the trial was to the effect that shortly before 3:00 A.M. on May 1, 1965 petitioner and Landry came to the third floor apartment in Boston in which Davis was killed in response to urgent telephone calls from the Dohertys that Davis was threatening them and their children with two revolvers. Before Connor and Landry arrived, Davis had fallen asleep on a couch in the den and had been disarmed by Mr. Doherty. When they arrived at the house, Connor and Landry rushed up the stairs and Mrs. Doherty pointed to the sleeping or dozing Davis as the one who had been threatening her family. Landry put a shotgun in Davis's belly and said, "Hey, hey" twice and, as Davis was awakening, shot him in the belly. Landry and Connor picked Davis up, one under each arm, dragged him to the doorway and let him drop down the stairs. Davis was left sprawled out on the front porch, dead.

Two witnesses identified petitioner as having accompanied Landry. One of them, Betty Moore, was a boarder occupying a room in the Doherty apartment and the other

[1] One of the excluded grounds, number (4), was nevertheless briefed by the petitioner and has been considered by the court. It claims prejudice from denial of petitioner's motion for severance because a bill of particulars filed in the case against one of the co-defendants contained an allegedly inflammatory description of the killing. This ground is obviously without merit.

was her friend, Ronald Hayes. Codefendant Mrs. Doherty testified that petitioner was not at her house on the night of the crime: Connor did not testify, but took advantage of the now unique Massachusetts practice, see *United States* v. *Cartano, etc.*, No. 7325, 1 Cir., Jan. 12, 1970, of making an unsworn statement to the jury in which he said he was not on the premises on the night of the crime.

The grand jury received evidence in June 1965 but took no action. It received further evidence in August and returned an indictment on August 4, 1965 charging Landry "and John Doe . . ." with the murder. On August 9 the Commonwealth filed a motion to amend the indictment by substituting petitioner's name for John Doe and the motion was allowed after a hearing at which no evidence was introduced.

During the period of approximately seven months between the indictment and the trial, defendants endeavored without success to interview Betty Moore, who was held in protective custody by the prosecution. Petitioner also sought to obtain a copy of her testimony before the grand jury in support of his motion to quash and dismiss the indictment on the ground that no evidence before the grand jury indicated that he was the "John Doe" intended to be arrested.

At the trial petitioner and other defendants unsucessfully sought disclosure by the prosecution of Moore's grand jury testimony, after she had admitted on cross-examination that she had testified falsely before the grand jury in June 1965. She testified that she had committed perjury before the grand jury in June because of threats by a relative of the Dohertys and that she told the truth to the grand jury in August. When the defendants, including the petitioner, moved that the prosecution be required to furnish the defense with a transcript of Moore's testimony before the June grand jury, the trial judge denied the mo-

tion explaining that the method which should be pursued by the defendants was to get the stenographer who had transcribed the grand jury minutes. The judge suggested that the prosecution attorney find out during recess the name of the stenographer and let defense counsel know so that they might bring the stenographer to the trial. So far as appears, none of the attorneys took any action in line with the court's suggestion. During further cross-examination, the defense attorneys elicited repeated admissions from witness Moore that she had committed perjury before the grand jury in June. The contents of Moore's grand jury testimony were undisclosed in the state courts and not offered in evidence in this court.

Conclusions of Law

The only substantial issue presented by the petitioner is the first part of ground (3) relating to petitioner's failure to obtain a copy of Betty Moore's testimony before the June grand jury. We shall therefore first discuss summarily grounds (1), (6) and (7) and the second part of ground (3). Ground (1) is that the amendment of the indictment to substitute Connor's name for John Doe was a violation of the Fifth Amendment of the Constitution of the United States.[2] But it is well settled that the due process clause of the Fourteenth Amendment does not make applicable to the states the grand jury requirement of the Fifth Amendment. *Hurtado* v. *California,* 1884, 110 U.S. 516, *Beck* v. *Washington,* 1962, 369 U.S. 541, 545. The second part of ground (3) is that petitioner's counsel was denied the opportunity of interviewing material witnesses

[2] In support of this and all other grounds for relief, petitioner has argued indiscriminately on the basis of the statutes and constitution of the Commonwealth of Massachusetts, as well as upon federal grounds. No effort has been made in the petition or in petitioner's brief to particularize the federal rights allegedly violated in the state courts apart from general references to various provisions of the federal Bill of Rights and the Fourteenth Amendment.

in the same manner as the prosecution, to which they were constantly available. Apart from its having scant support in the record and petitioner's reliance in this regard upon the Massachusetts Declaration of Rights, petitioner failed to object to the rulings of the judges of the Superior Court when the matter was brought before them in pretrial hearings and did not claim error on this score in the Supreme Judicial Court. He has probably waived this ground. In any event, he has not exhausted available state court remedies.[3] Ground (6) is that the trial court erred in excluding a certain line of questioning on crossexamination of witness Moore designed to test her credibility. Despite this court's orders before and at hearing, petitioner's brief does not attempt to show the involvement of a federal constitutional right in this contention apart from the general statement that trial procedures must be fundamentally fair. If there was error, it does not approach constitutional dimensions. Ground (7) is likewise illusory. It alleges an error in the case against codefendants Doherty, which the petition asserts was prejudicial to petitioner because severance was not ordered. Despite this court's orders, petitioner has made no attempt to demonstrate an exhaustion of avilable state court remedies with respect to this ground. 28 U.S.C. § 2254. Furthermore, this ground was virtually abandoned in petitioner's brief in this court, which devotes but a single sentence to the point, including a surprising disclaimer of prejudice to the petitioner.

The issue with respect to petitioner not having received a transcript of Betty Moore's testimony before the June 1965 grand jury, denominated the first part of ground (3), was preserved at the trial and argued on appeal. It has

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[3] Codefendants did preserve a similar point on appeal, without success. However, this does not excuse petitioner from seeking relief in the state courts because this ground involves a consideration of facts and circumstances of the case as they relate to a particular defendant.

not been disputed by the Commonwealth that the petitioner demonstrated a "particularized need", *Pittsburgh Plate Glass Co. v. United States*, 1959, 360 U.S. 395, 400, for disclosure of Betty Moore's grand jury testimony inasmuch as she admitted perjury before the June grand jury. Regarding defense counsel's demand at the trial that the transcript be made available to them for purposes of further crossexamination, it should be noted first that the *Pittsburgh Plate Glass Co.*, case did not decide whether such a procedure should be followed or whether the trial judge should examine the transcript *in camera* to ascertain the nature of the inconsistencies between the witness's testimony at trial and previously. *Dennis* v. *United States* 1966, 384 U.S. 855, 875, holding that the determination of what may be useful to a defendant can properly and effectively be made only by an advocate, was not decided until June 20, 1966, approximately three months after the completion of petitioner's trial. However, in *Commonwealth* v. *Ladetto*, 1965, 349 Mass. 237, 244-245, the Supreme Judicial Court anticipated the holding in *Dennis* and, on petitioner's appeal, applied the *Dennis* principle in deciding the discovery question against him, two justices dissenting. The Supreme Judicial Court held that the trial judge did not deprive the petitioner of access to the minutes of the June grand jury and that counsel's failure to pursue the course indicated by the trial judge, of procuring the attendance of the grand jury stenographer, was responsible for any prejudice to him.

In this court both parties have argued the question of the proper application of the *Dennis* rule without alluding to the necessary consideration whether it applies to criminal trials in state courts under the due process clause of the Fourteenth Amendment. It seems clear that it does not, because not "fundamental" nor "necessary to an Anglo-American regime of ordered liberty." See *Duncan* v. *Louisiana*, 1968, 391 U.S. 145, 149-50 n. 14. The Supreme

Court based it decision in *Dennis* upon its supervisory powers over federal district courts and not upon a constitutional right of the accused. *Broeckel* v. *Green,* N.D. Ohio 1967, 298 F.Supp. 249, 253. Discovery rights such as inspection of grand jury minutes are not of constitutional origin and they represent exceptions to the general rule concerning discovery in criminal cases, *Corbett* v. *Patterson,* D. Colo. 1967, 272 F.Supp. 602, 609. There has been no hint in Supreme Court cases that this procedure of disclosing grand jury minutes was thought to be compelled by the due process clause of the Fifth Amendment. *United States* v. *Lavallee,* 2 Cir. 1965, 344 F.2d 313, 315. Nor has there been any suggestion that the rule of the *Dennis* case should be applied retroactively.

Therefore any error by the courts of Massachusetts in deciding whether petitioner was entitled at trial to disclosure of witness Moore's grand jury testimony, at least as asserted by petitioner in the Supreme Judicial Court and in this court,[2] involved the interpretation of a rule of state law and not a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). With respect to the scope of federal habeas corpus jurisdiction, the identity of the state and federal discovery rules is immaterial.

Accordingly it is ordered that the petition be denied and the case dismissed.

(s) W. Arthur Garrity, Jr.
United States District Judge

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[4] In *United States* v. *Lavallee, supra,* at 315, it is stated, "It could be argued with some force that when the Grand Jury testimony is exculpatory and the trial testimony inculpatory . . . failure to make the Grand Jury testimony available on request is within the principle of decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense. *Brady* v. *Maryland,* 373 U.S. 83 [and other cases]." We intimate no opinion on any such contention in this case. Suffice it to note that the point has never been raised by petitioner in the Massachusetts courts. See *Lamoureux* v. *Comm. of Mass.,* 1 Cir. 1969, 412 F.2d 710, 711.